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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

APOLLO RESOURCES, INC. d/b/a APOLLO SERVICES, INC.,

Petitioner,

v.

QBE INTERNATIONAL INSURANCE, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the application of state law, which requires Fact Pleading in liability insurance coverage determination, violative of the Notice Pleading concept embodied in Rule 8(a) of the Federal Rules of Civil Procedure, and in conflict with the United States Supreme Court and federal appellate court decisions which hold that Notice Pleading in a federal lawsuit takes precedence over state law Fact Pleading requirements?

2. Is the decision of the Fifth Circuit Court of Appeals which held that liability insurance coverage determination is governed solely by an "Eight Corners" review (i.e., the "four corners" of the Complaint as compared against the "four corners" of the insurance policy) in conflict with the United States Supreme Court and federal appellate court decisions in which only Notice Pleading is required in a federal case?

3. Is the decision of the Fifth Circuit Court of Appeals, which held that no coverage was triggered in a liability insurance policy because there were no specific allegations of employment-related misrepresentations set forth in the Complaint, in conflict with the prior decision of the Fifth Circuit Court of Appeals which, on appeal from the judgment and the principal claim in this case, specifically held that the issue of misrepresentation in employment practice was correctly decided by the district court?

4. Is the decision by the Fifth Circuit Court of Appeals, which held that the insured had no right of reimbursement for cost of defense under the insurer's indemnity obligation of the insurance policy, in conflict with decisions of the federal appellate courts in the Third, Ninth and Eleventh Circuits?

STATEMENT PURSUANT TO RULE 29.6

Apollo Resources, Inc. d/b/a Apollo Services is wholly owned by Baker Hughes Oilfield Operations, Inc., a subsidiary of Baker Hughes, Inc. (a publicly traded company).

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	2
Relevant Provisions Involved	2
Statement of the Case	2
The Facts	2
Basis for Granting Writ of Certiorari	6
Reasons for Granting the Writ of Certiorari	7
Preface	7
A. In Conflict with Rule 8(a) of the Federal Rules of Civil Procedure.	9

Contents

Page

B. In Conflict with Decisions of the United States Supreme Court. 10

C. In Conflict with *Stone Petroleum Corp.*, 961 F.2d 90 (5th Cir. 1992). 12

D. In Conflict with the Decision of the Fifth Circuit Court of Appeals on Appeal by Plaintiffs in the Original Demand. 13

E. The Decision is in Conflict with Decisions in Other Federal Appellate Circuits. 14

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Gon v. First State Ins. Co., 871 F.2d 863 (9th Cir. 1989) 15

Kapache v. City of San Antonio, 304 F.3d 493 (5th Cir. 2002) 14

Leatherman v. Tarrant County Narcotics Unit, 113 S. Ct. 1160, 507 U.S. 163 (1993) 10

Little v. MGIC Indem. Corp., 836 F.2d 789 (3d Cir. 1987) 15

National Union Fire Ins. Co. of Pittsburgh, PA v. Brown, 787 F. Supp. 1424 (S.D. Fla. 1991), *affirmed without opinion*, 963 F.2d 385 (11th Cir. 1992) 15

North Mississippi Communications, Inc. v. Jones, 951 F.2d 652 (5th Cir. 1992) 14

Okada v. MGIC Indem. Corp., 823 F.2d 276 (9th Cir. 1987) 15

Stone Petroleum Corp. v. Ins. Co. of North America, 961 F.2d 90 (5th Cir. 1992) 6, 12, 16

Swierkiewicz v. Sorema, N.A., 122 S. Ct. 992, 534 U.S. 506, 152 L. Ed. 2d 1 (2002) 10

Cited Authorities

Page

Rules:

Fed. R. Civ. P. 8(a) ..... i, 2, 6, 9, 12, 16

Fed. R. Civ. P. 15(a) 2, 9, 16

Fed. R. Civ. P. 15(b) 17

Fed. R. Civ. P. 54(c) 2, 9, 16, 17

Statutes:

La. R.S. 23:631 ..... 1, 3

La. R.S. 23:632 ..... 1, 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 2

28 U.S.C. § 1332(a) 2

29 U.S.C. § 201, *et seq.* 3

29 U.S.C. § 209, *et seq.* 1

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed March 20, 2003 ..... 1a

Appendix B — Reasons For Judgment Of The United States District Court For The Western District Of Louisiana, Lafayette/Opelousas Division Filed October 25, 2001 ..... 16a

Appendix C — Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated And Filed February 20, 2001 ..... 26a

Appendix D — Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing Filed April 29, 2003 ..... 54a

Appendix E — Relevant Provisions Involved 56a

Petitioner, Apollo Resources, Inc. d/b/a Apollo Services, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Plaintiffs, former employees of Apollo Resources, Inc. (hereafter referred to as "Apollo"), filed suit against Apollo under the Fair Labor Standards Act, 29 U.S.C. § 209, *et seq.*, the Louisiana Wage Statute (La. R.S. 23:631-632) and general employment contract law (including employment-related misrepresentations). Apollo's employment practice liability insurance carrier, QBE International Insurance Limited (hereafter referred to as "QBE Insurer"), refused to defend Apollo against plaintiffs' claims; therefore, Apollo filed a Third Party Demand against QBE Insurer which, in the course of the litigation, was severed by the district court from the trial of the principal claim.

The United States District Court for the Western District of Louisiana, with the Honorable Richard T. Haik presiding, after the trial of the claims of six of the Plaintiffs, ruled in favor of Apollo and entered a judgment on March 9, 1999. Plaintiffs thereafter appealed to the United States Fifth Circuit Court of Appeals and that court affirmed the district court's judgment in favor of Apollo. *See* 242 F.3d 629 (5th Cir. 2001), Appendix C.

Thereafter, cross motions for summary judgment were filed by the parties in the Third Party Claim (Apollo and QBE Insurer), the only issue of which at that point was for reimbursement of costs of defense incurred by Apollo (over $500,000 in fees and expenses). The federal district court judge granted judgment in favor of Apollo awarding the costs

of defense on October 25, 2001 and certified the judgment as final. QBE Insurer thereafter appealed that judgment to the Fifth Circuit Court of Appeals on January 28, 2002, which, on March 20, 2003, reversed the district court judgment. *See* Appendix A. Apollo applied for a rehearing en banc on April 14, 2003 and this was entered on April 29, 2003. This Petition for Writ of Certiorari was filed on July 28, 2003.

STATEMENT OF JURISDICTION

Subject matter jurisdiction for the United States District Court for the Western District of Louisiana on the principal claim was federal question jurisdiction pursuant to 28 U.S.C. § 1331. Subject matter jurisdiction of the Third Party Demand at the district court and appellate court levels was diversity of citizenship pursuant to 28 U.S.C. § 1332(a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Rules 8(a), 15(a) and 54(c) of the Federal Rules of Civil Procedure. These provisions are set forth in Appendix E.

STATEMENT OF THE CASE

The Facts

At all pertinent times hereto, Apollo was an oilfield service company based in Lafayette, Louisiana. Apollo sought and upon payment of a premium obtained a policy of Employment Practices Liability insurance from QBE Insurer for protection against possible employment practice litigation costs and losses.

Thereafter, Plaintiffs, former employees of Apollo, filed suit against Apollo for employment practices allegedly in violation of the Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*), the Louisiana Wage Statute (La. R.S. 23:631-632) and general employment contract law (including employment-related misrepresentations), in the United States District Court for the Western District of Louisiana. The case was assigned to Federal District Court Judge Richard T. Haik. Apollo made demand upon QBE Insurer, its Employment Practices Liability carrier, to provide the defense of the litigation. QBE Insurer refused, alleging that the Plaintiffs' Complaint did not set forth any employment practices that were covered by the policy. Thereafter, Apollo provided its own defense and filed a Third Party Demand against QBE Insurer. The Third Party Demand against QBE Insurer was severed from the trial of the main demand.

In connection with the trial of the main demand, a Pretrial Order was issued on February 4, 1999, specifically setting forth the parties' allegations, contentions of facts, issues of fact and issues of law. In the Pretrial Order, Plaintiffs specifically alleged, among other things, that "Defendants were willful in using and applying the fluctuating work week method" (paragraph D on page 4 of the Pretrial Order). Additionally, Plaintiffs specifically set forth in the issues of fact whether Apollo properly informed them of the details of the fluctuating work week method of payment (paragraphs B, C, D, E on page 19 of the Pretrial Order). As a contested issue of law, Plaintiffs included the issue of whether Apollo properly represented the fluctuating work week method of payment to the plaintiffs (page 33 of the Pretrial Order.)

This Pretrial Order governed the trial of the case. At the conclusion of the presentation of the claims of six of the

Plaintiffs, Federal District Court Judge Haik ruled in favor of Apollo, deciding the issues which had been presented in the Pretrial Order, including the issues of whether there were misrepresentations by Apollo in its discussion with the employees regarding the fluctuating work week method of payment and other employment-related issues. Judge Haik made the following findings of fact when discussing his decision to rule in favor of Apollo on a plaintiff-by-plaintiff basis: (a) "There was certainly no misrepresentation," (b) "Certainly there is no misrepresentation," (c) "And certainly there has been no proof of misrepresentation or anything of that nature," (d) "And there is certainly no misrepresentation in this case even possible under the testimony that this Court heard," and (e) "I find that there is no misrepresentation of any kind in any way, shape, or form."

The Plaintiffs in the principal demand appealed to the United States Fifth Circuit Court of Appeals, which affirmed Judge Haik's decision and specifically stated that included in the Plaintiffs' contentions were that: (a) "Apollo *misrepresented* the number of hours they would be called upon to work," (b) "Apollo *misrepresented* the number of hours," and (c) "Apollo made *misrepresentations* about comparable amounts of time off." [Emphasis added]. The Fifth Circuit noted that, "Plaintiffs argued that they could not have formed a clear understanding of the fluctuating work week method of payment as a matter of law given these *misrepresentations*." [Emphasis added]. The Fifth Circuit affirmed the district court's judgment in favor of Apollo, partly on the basis that there was no evidence of misrepresentations. It has been admitted throughout this case that employment practices of misrepresentation are covered by the policy of QBE Insurer.

After the affirmation by the Fifth Circuit of the district court's judgment in favor of Apollo, Apollo filed a Motion for Partial Summary Judgment against QBE Insurer in the Third Party Demand to recover the defense costs which had been incurred by Apollo in the defense of the principal demand. QBE Insurer filed a cross Motion for Summary Judgment. The district court held that the Plaintiffs' allegations of misrepresentation triggered QBE Insurer's duty to defend, noted that QBE Insurer failed to do and ruled that defense costs were also owed under the indemnity "Loss" part of the policy. Accordingly, the district court awarded judgment in favor of Apollo with regard to the defense costs (exclusive of applicable deductibles under the policy). QBE Insurer appealed the Judgment to the Fifth Circuit Court of Appeals, which reversed the district court.

QBE Insurer's policy specifically covers "Employment related misrepresentations by an Insured." Plaintiffs allegations in the Pretrial Order set forth the factual basis on which the Plaintiffs argued misrepresentations at the trial of the principal demand. The district court addressed the contentions of misrepresentations and found no basis for them. The Fifth Circuit Court of Appeals addressed the issues of misrepresentation and affirmed the district court findings. (*See* Appendix C). Unquestionably, if any liability had been found on the part of Apollo for misrepresentations in its employment practices they would have been covered by the liability policy of QBE Insurer.

The second panel of the Fifth Circuit Court of Appeals, in reviewing the district court judgment on the Third Party Demand, held that since the Plaintiffs' original Complaint did not allege misrepresentations, there was no duty to defend and no duty to reimburse Apollo for defense costs.

This second panel of the Fifth Circuit Court of Appeals also denied Apollo's argument that it was owed the costs of defense as a "loss" under Part I of QBE Insurer's policy, since Part I of the policy required the insurer to pay those losses which the insured was legally obligated to pay. Apollo applied for rehearing *en banc*, but that application was denied.

BASIS FOR GRANTING WRIT OF CERTIORARI

I.

The narrow, factually specific requirement in the decision of the Fifth Circuit Court of Appeals is in conflict with:

A) The United States Supreme Court Federal Rule 8(a) of the Federal Rules of Civil Procedure with regard to Notice Pleading;

B) Decisions of the United States Supreme Court which reinforce the Notice Pleading concepts contained in the Federal Rules of Civil Procedure;

C) The Fifth Circuit Court of Appeals decision in the case of *Stone Petroleum Corp. v. Ins. Co. of North America*, 961 F.2d 90 (5th Cir. 1992), which applied the liberal rule of Notice Pleading of the federal system to determine whether there was a duty on the part of the insurer to defend a lawsuit; and

D) The decision reached by the first panel of the Fifth Circuit Court of Appeals on appeal of the Judgment in favor of Apollo regarding the principal demand.

II.

The decision of the Fifth Circuit Court of Appeals on the appeal of the Judgment in the Third Party Demand denying Apollo the reimbursement of defense costs under the indemnity provision of the policy is also in conflict with decisions involving the same issues out of the Third, Ninth and Eleventh Federal Circuits.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Preface

A Writ of Certiorari should be granted by this Court because the Fifth Circuit Court of Appeals decision is in conflict with the rules and decisions of the Supreme Court, in conflict with decisions of other federal appellate circuits, in conflict with the decision by the Fifth Circuit Court of Appeals in an unrelated matter and in conflict with the prior decision of the Fifth Circuit Court of Appeals in this case on the appeal of the Judgment in the principal demand.

A Writ of Certiorari should be granted by this Court because the subject matter at the nexus of this case is of paramount public importance, to-wit: the right of all liability insurance policy holders — from judges, to employers, to farm labors who insure their cars — to have an adjudication of insurance coverage determined on the merits of their cases, rather than on technicalities set forth in pleadings, has been put at risk. Billions of dollars are spent across the United States each year on premiums paid by the public to have protection for costs of litigation and from any losses that might be sustained as a result of any such litigation.

The Fifth Circuit Court of Appeals decision puts at risk an adjudication of the public's rights on whether or not the plaintiff's attorney, in drafting his or her Complaint, specifically alleges those issues within coverage, rather than on an adjudication based on the actuality of the merits of the claimed right by the insured. In short, the Fifth Circuit's decision allows the policyholder's adversary — through the fortuitous use or non-use of talismanic words in the paper captioned as the Complaint — to determine the policyholder's rights to the insurance protection afforded through payment of the premium under the policy purchased to protect the policyholder against just that sort of claim. The Fifth Circuit's decision has effectively imposed an improper "heightened pleading standard" that is not required by federal Notice Pleading.

Furthermore, a Writ of Certiorari should be granted because a federal question is involved, to-wit: the Fifth Circuit Court of Appeals has, in effect, ruled that state court substantive law can abrogate the Federal Rules of Civil Procedure which were created by this Court, ratified by the Congress and reinforced by United States Supreme Court decisions. The Fifth Circuit Court of Appeals held that the state law requiring the pleading of specificity of the facts and theories overrules the Notice Pleading of the federal system. The Rule that imposes Notice Pleading in the federal system was created by this Court to insure that justice is dispensed on actuality, not on technicality.

A. In Conflict with Rule 8(a) of the Federal Rules of Civil Procedure.

The United States Supreme Court, on December 20, 1937, ordered that the proposed Rules of Procedure for District Courts, which the Court co-authored, be adopted pursuant to Section 2 of the Act of June 19, 1934, and be transmitted to the Attorney General to report to Congress, which ultimately passed the law establishing those Rules.

Rule 8(a) provides that the pleading shall contain: (1) a short and plain statement of the jurisdiction; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for judgment for the relief sought by the pleader. In contrast, the Fifth Circuit Court of Appeals held in this case that the specific allegations of the Complaint did not spell out within the "Eight Corners" the employment-related misrepresentation basis for coverage and that, therefore, the insurance company had no obligation to defend the case, despite the undeniable facts that employment-related misrepresentations are covered by the Employment Practices Liability policy, are implicit in the facts and issues set forth in the Pretrial Order and were, in fact, tried before the district court. The district court deliberated and decided the issues of misrepresentation and the Fifth Circuit Court of Appeals, on appeal from the judgment of the district court in favor of Apollo, affirmed the district court, deciding that the claims by Plaintiffs of misrepresentation by Apollo were correctly decided by the district court (Appendix C).

By requiring specificity in pleadings the Fifth Circuit Court of Appeals' decision violates Rule 8(a). The decision of the Fifth Circuit Court of Appeals is also violative of a spirit of liberality of pleadings as set forth in Rules 15(a) and 54(c) of the Federal Rules of Civil Procedure.

B. In Conflict with Decisions of the United States Supreme Court.

This Court has repeatedly reviewed the issue of Notice Pleading and has held that Notice Pleading is a crucial concept to ensure that issues are decided on merits and not on technicalities. There are two cases of note that stand out — one because it is the most recent pronouncement of this Court, and the other because this Court corrected the Fifth Circuit's attempt to restrict Notice Pleading.

In *Swierkiewicz v. Sorema, N.A.* 122 S. Ct. 992, 534 U.S. 506, 152 L. Ed. 2d 1 (2002), the issue was whether claims for racial discrimination and violations of Title VII and under the Age Discrimination and Employment Act had to define the claim with factual specificity to establish a *prima facie* case of discrimination. This Court reversed the Second Circuit's "heightened pleading standard" on the basis that Rule 8(a) simply requires that the Complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

In *Leatherman v. Tarrant County Narcotics Unit*, 113 S. Ct. 1160, 507 U.S. 163 (1993), the Fifth Circuit Court of Appeals attempted to apply a "heightened pleading standard" to a complaint for civil rights violations against a municipality. This Court reversed the Fifth Circuit Court of Appeals' decision stating as follows:

> We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the federal rules. Rule 8(a)(2) requires that a complaint include only

'a short and plain statement of the claim showing that the pleader is entitled to relief.'

The Fifth Circuit Court of Appeals in the case at bar applied a "heightened pleading standard" in violation of the principles set out in the cases cited above.

What further offends the sense of justice in this case is that the Fifth Circuit Court of Appeals held that there was insufficient specificity of coverage of misrepresentation practices in the complaint despite: (a) the fact that the Pretrial Order, which superceded the original Complaint, specifically sets forth facts on which to establish the theories of misrepresentation; (b) the district court addressed the issues of misrepresentation at trial and found them without factual support; and (c) the decision of the first panel of the Fifth Circuit Court of Appeals, on appeal from the original demand, specifically discussed misrepresentation and found that the district court was correct in determining that there was no misrepresentation proven by the Plaintiffs.

C. In Conflict with *Stone Petroleum Corp.*, 961 F.2d 90 (5th Cir. 1992).

In *Stone Petroleum Corp., supra*, the Fifth Circuit Court of Appeals recognized the distinction between the federal system of Notice Pleading and Louisiana law which requires factual specificity in determining whether there is an obligation to defend on the part of the insurer. Applying the federal Notice Pleading, thereby reversing the district court, the Fifth Circuit stated as follows on page 93:

> . . . [I]t fails to assign sufficient weight to the essential difference between the federal Notice Pleading Rule and the Louisiana fact pleading rubric. The strict application urged by INA taken to its natural conclusion, would jeopardize every insured's rights to a defense in federal court litigation merely because the action was initiated by a pure notice and not a fact pleading.

The Fifth Circuit Court of Appeals' decision in this case is in conflict with the *Stone Petroleum Corp.* case, which recognized the conflict between the Notice Pleading of Rule 8(a) and Louisiana law which requires specificity of pleadings to provide coverage to the insured for the defense of the litigation.

D. In Conflict with the Decision of the Fifth Circuit Court of Appeals on Appeal by Plaintiffs in the Original Demand.

After the trial of the principal demand by Plaintiffs against Apollo, Federal District Court Judge Haik considered and adjudicated the issues of alleged misrepresentation practices by Apollo and the Fifth Circuit Court of Appeals, on appeal from Judge Haik's decision in favor of Apollo, again considered and decided the alleged misrepresentation practices set forth in the Pretrial Order that governed the trial of the principal demand. In its decision, the Fifth Circuit Court of Appeals stated as follows:

> They [the plaintiffs] assert two points here. First, they claim that Apollo misrepresented the number of hours that the employees would be called upon to work, specifically, that Apollo made misrepresentations about comparable amounts of time off. . . . They [the plaintiffs] argued that they could not have formed a clear understanding of the FWW method as a matter of law given these misrepresentations.

[Bracketed text added for clarity.]

The Fifth Circuit Court of Appeals' decision which is before this Court held that misrepresentation practices were not alleged in the Complaint and therefore QBE insurer had no obligation to defend and no obligation to reimburse Apollo for the cost of defense. The present decision of the Fifth Circuit Court of Appeals disregarded the allegations in the Pretrial Order (which superseded the Complaint), disregarded Judge Haik's consideration and adjudication of the alleged

misrepresentation practices and disregarded the decision by the prior panel of the Fifth Circuit Court of Appeals on appeal from the principal demand, affirming that there were no misrepresentation practices by Apollo.

The Fifth Circuit Court of Appeals' decision which is in question also disregarded the Law of the Case doctrine, which holds that a prior decision of the same court should be followed on an issue preclusion basis. *Kapache v. City of San Antonio*, 304 F.3d 493 (5th Cir. 2002); *North Mississippi Communications, Inc. v. Jones*, 951 F.2d 652 (5th Cir. 1992).

E. The Decision is in Conflict with Decisions in Other Federal Appellate Circuits.

Federal District Court Judge Haik held that Apollo was entitled to recover the defense costs as a "loss" under the indemnity side of the policy. The Fifth Circuit Court of Appeals refused to consider this ruling.

The policy of QBE Insurer contains Parts I and II which set out the insured's obligations to its insured.

> Part I obligates the insurer to pay "loss" that the insureds are legally obligated to pay . . . for a Wrongful Employment Practice. . . . "Loss" is defined in III(J) as "money damages, settlements and defense costs."
>
> Part II provides that QBE Insurer has "the duty to defend all claims for a Wrongful Employment Practice" which includes "Employment-related misrepresentation by an insured; . . . ."

Federal District Court Judge Haik ruled and Apollo submitted to the Fifth Circuit Court of Appeals that QBE Insurer was obligated to pay the "loss" which included "defense costs," irrespective of whether QBE insurer has the duty to defend the action. The Fifth Circuit Court of Appeals refused to consider this basis for Apollo's reimbursement of defense costs, said refusal which is contrary to the following Federal Circuit Court of Appeals decisions:

1. *Gon v. First State Ins. Co.*, 871 F.2d 863 (9th Cir. 1989) in which the insurance policy provided no duty to defend on the part of the insurer; the policy did provide that the insurer was to pay for the loss sustained by the insured including the cost of defense. The Ninth Circuit Court of Appeals held that the absence of a duty on the part of the insurer to defend a claim was superfluous since the insurer was obligated to pay the cost of defense under the concept of "loss."

2. *Okada v. MGIC Indem. Corp.*, 823 F.2d 276 (9th Cir. 1987);

3. *Little v. MGIC Indem. Corp.*, 836 F.2d 789 (3d Cir. 1987); and

4. *National Union Fire Ins. Co. of Pittsburgh, PA v. Brown*, 787 F. Supp. 1424 (S.D. Fla. 1991), *affirmed without opinion*, 963 F.2d 385 (11th Cir. 1992).

These Federal Circuit Appellate Courts held that the obligation of the insurer to reimburse the insured for the "loss" ~~sus~~tained in the cost of defending the lawsuit is completely independent from the duty of the insured to

defend the litigation. Stated another way, where the insurer has no duty to defend and its policy covers cost of defense as an element of "loss," the insurer has the obligation to reimburse its insured for those expenses. The Fifth Circuit Court of Appeals, in conflict with those federal appellate circuits, refused the claim by Apollo to be reimbursed for the cost of defense under Part I of the policy which requires that QBE Insurer pay the cost of defense as an element of "loss" under Part I.

CONCLUSION

It is respectfully requested that a Writ of Certiorari be granted for the following reasons:

A. The decision of the Fifth Circuit Court of Appeals, applying a "heightened pleading standard" that required specificity in the Complaint as a prerequisite to finding coverage, is violative of and inimical to Paragraph 1, the Orders of this Court, specifically Rule 8(a) as reinforced by Rules 15(a) and 54(c) of the Federal Rules of Civil Procedure and the decisions of the United States Supreme Court which reinforce the letter and the spirit of Rule 8(a) to safeguard against deprivation of rights by technicalities in the drafting of the Complaint.

B. The decision of the Fifth Circuit Court of Appeals is in conflict with *Stone Petroleum Corp. v. Ins. Co. of North America, supra*, which applied Notice Pleading of the Federal Rules over the Louisiana law requiring Fact Pleadings.

C. The Fifth Circuit Court of Appeals' decision that refused to allow reimbursement for cost of defense under Paragraph I of the Employment Practices Liability policy,

which obligates the insurer to pay the insured's loss, including cost of defense, is in conflict with federal appellate decisions in the Third, Ninth and Eleventh Federal Circuits.

D. Of public and paramount importance is the basic subject which is at the heart of this litigation and which is how to ensure that the millions of policyholders in this country who pay billions of dollars in premiums for protection against litigation, be given an opportunity to present their rights without being restricted on how the Complaint is fortuitously drafted by the plaintiff's lawyer.

E. The federal law issue of whether state laws which require specificity of pleadings to determine coverage and obligation to defend is in violation of the Notice Pleading set forth by this Court in its orders and decisions at the core of cases reported in the West Federal Practice Digest under Insurance, Key Numbers 2913 and 2914, where the federal courts in various circuits have reached a variety of results on the basis of the particular state law requirements of specificity in pleadings. This, in effect, becomes a "heightened pleading standard" that is inimical to the Notice Pleading embodied in Rule 8 and the liberality of the amendment of pleadings to conform to the evidence as set forth in Rules 15(b) and 54(c) of the Federal Rules of Civil Procedure.

It is, therefore, necessary that a Writ of Certiorari be granted so that this Court can resolve the issue of whether Notice Pleading should prevail over state laws that require specificity of pleadings to provide coverage to the insured.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 20, 2003

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30218

GEORGE C. SAMSON III, ET AL,

Plaintiffs,

v.

APOLLO RESOURCES INC., Etc.; ET AL,

Defendants,

APOLLO RESOURCES INC.,
doing business as Apollo Services Inc.,

Defendant - Third Party Plaintiff -
Cross Defendant - Appellee,

v.

QBE INTERNATIONAL INSURANCE, LIMITED.,

Third Party Defendant -
Cross Claimant Appellant.

Appendix A

Appeal from the United States District Court
For the Western District of Louisiana, Lafayette
(98-CV-62)

Before DAVIS, BARKSDALE, and DENNIS, Circuit Judges.*

W. EUGENE DAVIS, Circuit Judge:**

Apollo Resources, Inc. ("Apollo") seeks recovery against QBE International Insurance, Limited ("QBE"), under its Employment Practices Liability Insurance Policy. Apollo seeks to recover defense costs it incurred in defending an action brought by its employees for overtime compensation which QBE declined to defend. The district court found that QBE owed Apollo a defense and granted partial summary judgment in favor of Apollo on this claim. For the reasons that follow, we conclude that the policy provides no coverage for the claims asserted by Apollo's employees. We, therefore, vacate the district court's grant of partial summary judgment in favor of Apollo and remand the case with instructions to enter judgment in accordance with this opinion.

---

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

** Judge Dennis concurs in the judgment only.

Appendix A

I.

Apollo asserted a third party demand against QBE seeking reimbursement of defense costs incurred in Apollo's successful defense of this suit[1] by thirty of its former employees. Apollo's employees brought the suit to recover overtime compensation which Apollo defended after QBE denied coverage. The employees alleged that Apollo wrongfully avoided payment of overtime by its improper use of a fluctuating workweek ("FWW")[2] or sliding scale method

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1. The Fifth Circuit affirmed the district court's judgment in favor of Apollo in the underlying suit. *Samson v. Apollo Res., Inc.*, 242 F.3d 629 (5th Cir. 2001).

2. Regulations promulgated by the Department of Labor under the F.L.S.A. authorize employers to use various methods of calculating overtime compensation to suit different employment needs. The FWW is one such method. 29 C.F.R. § 778.114. As we explained in *Samson*:

> Under the FWW method, the employee receives a fixed salary as compensation for all hours worked by the employee, whether above or below forty hours, as well as an additional overtime premium for each overtime hour. The overtime premium is calculated by dividing the fixed weekly salary by the number of hours that the employee actually works in a particular week to yield the employee's "regular rate of pay." The employee is paid an overtime premium of one-half his regular rate of pay for each overtime hour. This premium is in addition to his fixed weekly salary.

242 F.3d at 633.

of calculating overtime pay. The Employment Practices Liability policy QBE issued is a "claims made" policy effective from May 21, 1997, to May 21, 1998.

In 1995, the Department of Labor began an investigation into Apollo's use of the FWW calculation method.[3] As a result of this investigation, Norman Landry, a former Apollo employee, wrote a letter on January 25, 1996, to Apollo demanding payment of overtime wages allegedly due as a result of Apollo's improper use of the FWW method of calculating overtime wages.

On February 6, 1996, James Meche filed a complaint in district court seeking to recover overtime wages due and payable pursuant to the Fair Labor Standards Act ("F.L.S.A."), 29 U.S.C. § 203 *et seq.*, alleging that Apollo's use of the FWW method was an illegal practice. In his Complaint, Meche asked the district court to appoint him as class-representative for other similarly situated individuals. The district court dismissed Meche's suit without prejudice on August 8, 1997.

Samson and Smith filed the underlying suit against Apollo on May 27, 1997 ("*Samson* suit"). A total of twenty-eight additional plaintiffs, including Landry and Meche, joined the suit.[4] The plaintiffs in this suit ("Plaintiffs") sought unpaid wages, safety bonuses, attorney's

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3. The Department of Labor ruled Apollo's wage calculation method to be legal.

4. Thirty-six former employees joined the suit, but six were dismissed or withdrew at various times.

fees and punitive damages resulting from Apollo's alleged illegal application of the FWW method. In March 1988, the district court consolidated the suit with the related *Norton and Weaver v. Apollo* ("*Norton* suit") case and declared a "collective action." The district court tried the claims of six of the Plaintiffs and granted Apollo's Motion for Judgment as a Matter of Law at the close of the Plaintiffs' case. The Fifth Circuit affirmed.[5]

The district court severed Apollo's third party demand against QBE from the underlying suit. After this court affirmed the district court's judgment in favor of Apollo in the underlying litigation, the district court proceeded to consider the issue of coverage between Apollo and QBE. The district court granted partial summary judgment in favor of Apollo and concluded that QBE owed a defense to Apollo on the underlying suit. The court also entered judgment in favor of Apollo in the amount of $362,362.49 for costs and expenses incurred.

Following entry of the district court's Order and Reasons for Judgment, QBE requested certification of an interlocutory appeal under 28 U.S.C. § 1292(b). Apollo asked the district court to certify the grant of partial summary judgment as a partial final judgment appealable under Federal Rule of Civil Procedure 54(b). The district court inadvertently entered the

5. The district court severed and stayed the claims of the remaining twenty-four Plaintiffs pending the outcome of this trial. Following the Fifth Circuit's decision, the remaining twenty-four Plaintiffs dismissed their claims with prejudice in stipulated judgments approved by the district court as part of a settlement agreement with Apollo.

§ 1292 (b) certification, but later withdrew the certification and entered judgment under Rule 54(b).

II.

QBE argues first that the district court erred in certifying the partial summary judgment as a partial final judgment appealable under Federal Rule of Civil Procedure 54 (b) rather than certifying it for interlocutory appeal under 28 U.S.C. § 1292(b). We review this question *de novo*.

Federal Rule of Civil Procedure 54 (b) allows a district court to expressly direct entry of a final judgment on "one or more but fewer than all of the claims or parties" to a suit "upon an express determination that there is no just reason for delay." FED. R. CIV. P. 54(b). QBE argues that a Rule 54 (b) certification is inappropriate in this case because there was no final disposition of a claim. QBE argues that one of its affirmative coverage defenses – that Apollo made a material misrepresentation in its policy application – was not ripe for decision and precluded the district court's entry of judgment on Apollo's claim for defense costs. QBE argues that it expressly reserved this affirmative defense for trial, and Apollo did not specifically request summary judgment on this issue. QBE relies on *Sharlitt v. Gorinstein*, 535 F.2d 282 (5th Cir. 1976), in support of its position that it was inappropriate for the district court to enter summary judgment *sua sponte* without providing adequate notice and opportunity for QBE to present its argument.

QBE's reliance on *Sharlitt* is misplaced. Apollo requested a judgment from the district court ordering QBE to honor its

defense obligations, and ordering QBE to reimburse Apollo for the attorney's fees and litigation costs that Apollo has incurred to date in defense of the underlying suit. Such a request by its terms required the district court to consider all defenses QBE might have to coverage, including QBE's material misrepresentation defense.

The party moving for summary judgment bears the initial burden of production to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has met his initial burden of production, the burden shifts to the nonmovant to set forth "specific facts showing that there is a genuine issue for trial." *Id.* at 324. QBE failed to introduce evidence of Apollo's material misrepresentation in opposition to Apollo's Motion for Partial Summary Judgment on the issue of QBE's duty to defend and reimburse Apollo for defense costs. It was QBE's duty to come forward with evidence to demonstrate that a material issue of fact existed on its affirmative defense, requiring a trial on the merits. QBE could not simply "reserve" this defense to coverage and thus shield itself from an adverse summary judgment on the coverage issue.

The district court's grant of partial summary judgment in favor of Apollo resolved Apollo's claim that QBE was obliged to defend Apollo in the *Samson* litigation and reimburse Apollo for its defense costs.[6] The district court properly entered a Rule 54(b) final judgment certification.

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6. Apollo's claim for bad faith failure to provide coverage is still pending in the district court.

Appendix A

III.

QBE argues next that the district court erred in granting summary judgment in favor of Apollo and ruling that QBE's policy required QBE to furnish Apollo a defense and reimburse Apollo for defense costs already incurred in defending the Consolidated Action Suit. We review the district court's grant of partial summary judgment *de novo*. *See Blow v. City of San Antonio*, 236 F.3d 293, 296 (5th Cir. 2001).

In determining whether coverage for defense costs is provided under a policy, Louisiana law – which controls this issue – adopts the Eight Corners Rule and requires us to compare the allegations in the complaint to the policy provisions. As we explained in *Alert Center, Inc. v. Alarm Protection Services, Inc.*, 967 F.2d 161, 163 (5th Cir. 1992):

> Under Louisiana law, an insurer has a duty to defend its insured unless the allegations in the complaint unambiguously exclude coverage. *Meloy v. Conoco, Inc.*, 504 So. 2d 833, 838 (La. 1987) (citing *American Home Assurance Co. v. Czarniecki*, 255 La. 251, 230 So. 2d 253 (1969)); *Jensen v. Snellings*, 841 F.2d 600, 612 (5th Cir. 1988) (applying Louisiana law). Coverage is determined by comparing the allegations in the complaint with the terms of the policy, and the court is to look only at the face of the complaint and the insurance contract in reaching this determination. *Jensen v. Snellings*, 841 F.2d at 612; *Scarborough v. Northern Assurance Co. of*

> *America*, 718 F.2d 130, 134 (5th Cir. 1983) (applying Louisiana law). The insurer has a duty to defend its insured if the complaint discloses the possibility of liability under the policy. *Meloy v. Conoco*, 504 So. 2d at 839. Thus, if the complaint alleges a single claim against the insured that is covered by the policy, the insurer must defend the entire lawsuit, even those claims clearly excluded from coverage. *Montgomery Elevator Co. v. Building Engineering Services Co., Inc.*, 730 F.2d 377, 382 (5th Cir. 1984) (applying Louisiana law).

"The duty to defend is determined solely from the plaintiff's pleadings and the face of the policy, without consideration of extraneous evidence." *Houghtaling v. Richardson*, 800 So.2d 1012, 1014 (La. Ct. App. (5th Cir.) 2001). If the complaint asserts facts that, if proven, establish both coverage under the policy and liability to the plaintiff, the insurer must defend the insured regardless of the outcome. *Czarniecki*, 230 So.2d at 259.

Under the policy, QBE agreed:

> To pay on behalf of the Insureds Loss that the Insureds are legally obligated to pay as a result of any Claim first made against the Insureds during the Policy Period for a Wrongful Employment Practice, provided always that such Wrongful Employment Practice occurs:
>
> 1. During the Policy Period, or

Appendix A

2. Prior to the effective date of this Policy, provided further that the Insured had no knowledge prior to the effective date of this Policy of any matter, fact or circumstance that would cause a reasonable person to believe that a Claim for such Wrongful Employment Practice might be made.

The term "Wrongful Employment Practice" is defined in the policy[7] and limits covered acts to specific types of conduct

7. The policy defines "Wrongful Employment Practices" to mean:

any actual or alleged:

1. Wrongful Employment Termination by an Insured of an Employee;

2. Discrimination by an insured against an Employee or an applicant for employment;

3. Sexual harassment by an Insured of an Employee;

4. Adverse employment action in violation of the whistle blower provisions of any federal, state or local law;

5. False arrest, libel, slander or defamation, invasion of privacy, assault or battery by an Insured of an Employee, when asserted in connection with a Claim within III.0.1. through III.0.4 above;

6. Employment-related misrepresentation by an Insured; or

7. Negligent hiring, supervision, promotion, demotion or retention.

by the employer. The only conduct relevant to this case included in the definition is "employment-related misrepresentation by an Insured."

QBE argues that coverage for Apollo's defense costs is excluded by Exclusion H of the policy which denies coverage for Wrongful Employment Practices that relate back to claims made before the effective date of the policy and Interrelated Wrongful Employment Practices.[8] Consideration of QBE's argument led us to consider whether the terms of the policy provided coverage for defense costs absent this exclusion. After the issue of coverage was raised in more detail at oral argument, the parties were asked to submit additional briefs directly addressing the application of the Eight Corners Rule and the exclusions in the policy's "Loss" provision to this case.

In its original brief to this court, Apollo did not rely on any misrepresentation allegation the Plaintiffs made in their

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8. Exclusion H denies coverage for any claim made against an Insured:

> Based upon or directly or indirectly arising out of:
>
> 1. Any Wrongful Employment Practice or any matter, fact or circumstance that has been the subject of any claim made prior to the effective date of this Policy or of any notice given during any prior policy;
>
> 2. Any other Wrongful Employment Practice which, together with a Wrongful Employment Practice that has been the subject of any claim or notice identified in H.1. above, would constitute Interrelated Wrongful Employment Practices.

Complaint to establish coverage or a duty to defend. Rather, Apollo pointed to the deposition testimony of former Apollo employees to support their contention that these plaintiffs based their claim in part on "misrepresentations." When asked by the court following argument to submit a supplemental brief citing specific allegations in the Plaintiffs' Complaint that alleged misrepresentations, Apollo points to four paragraphs from the Complaint,[9] the deposition testimony of some of the Plaintiffs and our opinion in *Samson v. Apollo Resources, Inc.*, 242 F.3d 629 (5th Cir. 2001).

Federal courts liberally construe the complaint to determine if it asserts claims that are unambiguously excluded from coverage. *See Stone Petroleum Corp. v. Ins.*

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9. In its supplemental brief, Apollo points to the following portions of the Plaintiffs' Fourth Amended Complaint as alleging employment-related misrepresentations:

> 21.
> The underpayment for the plaintiffs misuse of the "sliding scale" method of making overtime payments.
>
> 22.
> The defendant's employee contracts for fluctuating hours, as used by the defendant and applied to these plaintiffs, violated the Fair Labor Standards Act's requirements for fluctuating hours employee contracts.
>
> 24.
> The misuse of the sliding scale method and fluctuating hours contracts was willful.
>
> 25.
> The defendant also withheld "safety" bonuses from the plaintiffs.

Co. of N. Am., 961 F.2d 90, 92 (5th Cir. 1992). Apollo argues that, liberally construed, the Plaintiffs' Complaint alleges employment-related misrepresentations. We disagree. The Plaintiffs alleged that Apollo underpaid the amount of regular and overtime wages due Plaintiffs in violation of the Fair Labor Standards Act as a result of Apollo's misuse of the FWW method. Plaintiffs sought unpaid compensation, safety bonuses and liquidated damages, attorney's fees and pre-judgment interest under the F.L.S.A. and penalties for failing to promptly pay wages due. The complaint filed in the *Norton* suit alleged nearly identical claims. As QBE properly points out, misrepresentation is not a required element of an F.L.S.A. wage claim. *See* 29 C.F.R. 778.0 *et seq*. The only allegation that even arguably could include misrepresentations is the assertion that Apollo misused the sliding scale wage method. However, Apollo candidly admits in its letter brief that the misuse of the sliding scale "does not fall within the definition of 'wrongful employment practice' in the QBE policy." Liberally construing the Plaintiffs' Complaint, we find no allegations in the complaint that Apollo made any misrepresentations regarding their employment that would give rise to coverage in this case.

Apollo also points to facts developed outside the pleadings to support coverage. The court requested that Apollo provide support for its position that we may consider facts developed in the Plaintiffs' deposition testimony introduced at trial in determining whether QBE owed a duty to defend the underlying suit. Apollo simply points to Fed. R. Civ. P. 15 (b) which allows amendment of the pleadings to conform to the evidence introduced at trial.

Apollo provides no authority to support its position that facts outside the complaint may be considered under the Eight Corners Rule.

All of the Louisiana cases we have found discussing this issue definitively state that Louisiana law does not permit reliance on evidence extrinsic to the complaint to demonstrate the insurer's obligation to defend. *See Houghtaling*, 800 So.2d at 1014; *Stone Petroleum Corp.* 961 F.2d at 92; *KLL Consultants, Inc. v. Aetna Cas. & Sur. Co.*, 738 So.2d 691, 696 (La. App. (5th Cir.) 1999). In *Singleton v. United Tugs, Inc.*, 710 So.2d 347 (La. App. (4th Cir.) 1998), the court refused to impose a duty to defend when the insurance company made the decision that it owed no duty to defend based on the plaintiff's failure to allege covered claims in his petition, even though the plaintiff produced evidence at trial that triggered coverage. Adopting a rule that would impose a duty to defend based on evidence arising during trial would run counter to the sensible bright line rule which allows insurance companies to make a decision on their duty to defend at the outset of litigation based on the allegations of the complaint.

Because Plaintiffs asserted no claim that was covered by QBE's policy, QBE owed no duty to defend Apollo in the underlying suit. *See Czarniecki*, 230 So.2d at 259. Because QBE had no duty to defend, Apollo, it also has no duty to reimburse Apollo for the defense costs Apollo spent defending the underlying suit.[10]

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10. Apollo argues in its letter brief that the Eight Corners Rule is irrelevant to the resolution of this case because "QBE's policy contains an independent contractual duty on the part of QBE to

(Cont'd)

Appendix A

V.

For the reasons stated above, we conclude that the district court erred in granting partial summary judgment in favor of Apollo on the issue of QBE's duty to defend and to reimburse Apollo for defense costs, and we must VACATE that judgment. Given our conclusion on the coverage issues, Apollo's claim for penalties for willful failure to provide coverage must also fall. We therefore REMAND this case to the district court with instructions to enter judgment consistent with this opinion.

VACATED and REMANDED.

(Cont'd)
reimburse Apollo for its defense costs, a duty that is not dependant on the obligation . to defend or the 'Eight Corners Rule'." Apollo relies on dicta in *FDIC v. Booth*, 824 F. Supp. 76 (M.D. La. 1993) that interprets a particular policy provision that is not pertinent to this case.

APPENDIX B — REASONS FOR JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAFAYETTE/ OPELOUSAS DIVISION FILED OCTOBER 25, 2001

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

CIVIL ACTION NO.: CV97-1053
JUDGE HAIK
MAGISTRATE JUDGE METHVIN

GEORGE C. SAMSON, III, ET AL.,

VERSUS

APOLLO RESOURCES, INC., ET AL.

CONSOLIDATED WITH

CIVIL ACTION NUMBER: 98-0062
JUDGE HAIK
MAGISTRATE JUDGE METHVIN

CRAWFORD R. NORTON, ET AL.

VERSUS

APOLLO RESOURCES, INC., ET AL.

Appendix B

REASONS FOR JUDGMENT

Pending before the Court are the respective Motions for Summary filed on behalf of Apollo Resources, Inc., ("Apollo"), and QBE International Insurance Limited ("QBE"). After reviewing the motions and responses thereto, hearing oral argument of the parties, and being fully apprized of the premises of the motions, the Court finds as follows:

1. QBE International Insurance Limited ("QBE") issued to Apollo, a policy of Employment Practices Liability ("EPL") insurance bearing policy number SUA 30103, with effective coverage dates of May 21, 1997 through May 21, 1998, which is filed of record in this litigation;

2. Immediately prior to the QBE policy inception date, Apollo had EPL liability insurance in place for the year May 21, 1996 - May 21, 1997, under a policy issued by Underwriters at Lloyds, London;

3. Prior to the QBE policy inception date, Apollo's fluctuating work week pay plan was determined to be in compliance with applicable regulations by the same person who, during his tenure with the Department of Labor, assisted Apollo in setting up that pay plan (namely, Don Strobel);

4. There is no evidence in the record that any other persons asserted "claims" (as that term is defined in the QBE policy) against Apollo pror to the QBE policy inception date of May 21, 1997, except for James Meche ("Meche") and Norman Landry ("Landry");

5. After the QBE policy incepted on May 21, 1997, no fewer than 28 other plaintiffs (other than Meche and Landry) filed claims for the first time against Apollo, to-wit: (i) two original claimants (George Samson and Kevin Smith) first sued Apollo on May 27, 1997; (ii) two additional claimants (Douglas Bell and Melvin Kyle Smith) were added as plaintiffs on or about November 10, 1997; (iii) an additional claimant (Christopher Cornes) was added as a plaintiff on or about November 21, 1997; (iv) an additional claimant (Norman Landry) was added as a plaintiff on or about November 26, 1997; (v) an additional claimant (James Meche) was added as a plaintiff on or about December 19, 1997; (vi) two additional claimants (Crawford Norton and Lester Weaver) filed a separate action on or about January 14, 1998; and (vii) as a result of the mailing of the collective action notification letters pursuant to this Court's Order of March 18, 1998, 24 additional "opt-in" claimants were added to the collective action lawsuit during 1998;

6. There is no evidence in the record to show that Apollo knew or had reason to know that Samson, Smith and the other plaintiffs (except for Landry and Meche) would file claims against Apollo; therefore, it is not reasonable for Apollo to have believed that additional claimants would file claims since Apollo's pay plan was legal in all pertinent respects. None of the 30 claimants (except for Landry and Meche) who eventually asserted "claims" against Apollo in this litigation were listed amongst the 65 employees identified in the Department of Labor ("DOL") investigation of 1994/5. It is not reasonable for Apollo to have believed that additional claimants not even identified in the DOL investigation might some day make a claim against Apollo,

particularly given the passage of time and the facts that: (i) a large number of employees (past and present) were paid under Apollo's fluctuating work week pay plan and discretionary bonus system but did not file any claims against Apollo fluctuating work week pay plan and discretionary bonus system but did not file any claims against Apollo with respect to same; and (ii) Apollo's pay plan was legal in all material respects as this Court specifically found and as affirmed on appeal;

7. Part of the claims asserted by the 28 claimants/plaintiffs against Apollo were based on allegations of employment-related misrepresentations;

8. The QBE policy provided that QBE had "the right and duty to defend all Claims for a Wrongful Employment Practice";

9. The QBE policy defines "Claim," in pertinent part, as "any written notice or written demand for monetary damages received by an Insured, including service of suit. . ." but excludes proceedings commenced before a governmental agency where that agency has no power to award monetary relief with respect to Wrongful Employment Practices;

10. The Court finds as a matter of fact that the DOL investigation of 1994/5 referred to above does not satisfy the above definition of "claim" because the DOL had no power to award monetary relief.

11. The QBE policy definition of "Wrongful Employment Practice" included "any actual or alleged . . . Employment-related misrepresentation by an Insured."

Appendix B

12. The QBE policy contained a definition of "Loss" which included "Defense Costs," which in turn was defined, in pertinent part, in the policy as "reasonable and necessary legal fees and expenses incurred in the defense of any Claim, including the costs of appeal, attachment, or similar bonds."

13. Apollo has incurred defense costs as defined in the QBE policy in the defense of the claims filed by the plaintiffs who first asserted claims against Apollo after the QBE policy incepted on May 21, 1997;

14. APOLLO continues to incur "defense costs" as defined in the QBE policy because it is currently responding to an Application for Writ of Certiorari (at the United States Supreme Court) which was filed by the six plaintiffs who lost at the trial of the main demand in this litigation;

15. Upon being sued by the first few Plaintiffs in the above-captioned matter, Apollo filed a Third Party Demand against QBE, alleging that the "claims" of the plaintiffs fell within the scope of coverage afforded by the QBE policy;

16. Although being duly notified by Apollo of the claims, including by being sued by Apollo for defense and coverage, QBE denied both coverage and defense to Apollo and has maintained that position through the conclusion of the trial, and to the present date;

17. QBE has not reimbursed Apollo for any defense costs to date or undertaken to defend APOLLO for the claims asserted against it by the plaintiffs in this litigation.

Appendix B

18. Louisiana jurisprudence analyzes insurable events by looking to the effect rather than to the cause of the injurious event. This approach is fair to both insurer and insured, since it prevents the insurer from dividing a single coverage limit among multiple plaintiffs, and it prevents the insured from the "stacking" of coverages where a single claimant sustains multiple injuries or claims because of a single or a repeated tort or a series of closely-related torts by a single tortfeasor;

19. When read together, the "Interrelated Wrongful Employment Practices" definition found in §III(I) of the QBE policy and the "Notice of Claim" provision concerning "Interrelated Wrongful Employment Practices" found in §VII(B) of the QBE policy constitutes the functional equivalent of the "Unifying Directive" clause found in the standard "occurrence" type Commercial General Liability policy. This clause serves to treat all claims asserted by a single plaintiff against a commercial entity holding such policies as a single claim, thus allowing only one coverage limit per claim and requiring only one deductible per individual plaintiff per policy period. Put another way, this doctrine (see *Lombard*) prevents the insurer from reducing the applicable policy limit for an insurable event by dividing it amongst multiple claimants.

Likewise, the policy language (i.e., the "Unifying Directive" and the Interrelated Wrongful Employment Practices clauses) prevents the insured from raising the applicable policy limit by multiplying it times the number of claims a single claimant brings because of a single event or repeated substantially similar insurable events.

Appendix B

20. In light of the above, each plaintiff in this litigation asserts separate and distinct claims against Apollo; therefore, there were 28 claims asserted in this lawsuit which are covered under the QBE policy (exclusive of claims asserted by Meche and Landry), with each subject to its own separate deductible;

21. Exclusions contained in insurance policies must be narrowly construed and if the exclusion is subject to two or more reasonable interpretations, the interpretation favoring coverage is applied;

22. Ambiguity in an insurance policy is to be resolved in favor of the insured and coverage where it is reasonably possible to do so.

23. The QBE policy definition of "Loss," found in Definition III (J), specifically excludes "any compensation or benefits earned in the course of employment by an Insured Person but not paid by the Insured Organization." This provision is ambiguous in that it is susceptible of at least two different meanings. QBE argues that any money damage awarded for a Wrongful Employment Practice in any way geared to wages is excluded. Apollo says the exclusion is restricted to excluding recovery for wages indisputably earned by the employee, but not paid by the employer under a contract of employment. Under the guiding principles of Lousiana law, this must be construed against QBE and in favor of coverage. Accordingly, the Court finds that this provision only serves to prevent the policy from being used to pay wages which have been earned by the employee pursuant to a contract mutually agreed upon by both employer and employee, but

which the employer then fails or refuses to pay in breach thereof. In essence, this exclusionary language serves to prevent the QBE policy from being used as "payroll insurance" for an employer; otherwise, the essential element of fortuity critical to the existence of insurance would be absent. Further, to adopt the broad interpretation sought by QBE would in large measure emasculate cost, if not all, of the coverage afforded for the various Wrongful Employment Practices defined in QBE's policy (such as discrimination by an insured against an employee or applicant for employment, wrongful employment termination, adverse employment action against whistle blowers or negligent demotion), since wages for jobs or promotions wrongfully refused by the employer (and therefore not *agreed to*) are routinely used as the measure of damages in such claims.

24. The Court finds that coverage exists under the QBE policy for the claims of the 28 plaintiffs who first made claims against APOLLO after the QBE policy incepted on May 21, 1997, because the claims of those 28 plaintiffs included allegations of employment-related misrepresentations;

25. The Court finds that the QBE policy does not clearly and unambiguously exclude coverage for the claims of the 28 plaintiffs who first asserted claims against Apollo after the QBE policy incepted on May 21, 1997;

26. The Court finds that the QBE policy obligates QBE to reimburse Apollo for its "defense costs" incurred to date in the defense of the claims filed by the 28 plaintiffs after the inception date of the policy on May 21, 1997, and to continue to reimburse "defense costs" incurred by Apollo as "Losses" (as defined in QBE's policy) in this litigation;

Appendix B

27. The Court finds that the duty of QBE to reimburse Apollo for its "defense costs" is a contractual obligation imposed on QBE under its policy definitions of "Loss" and "Defense Costs," which is independent of QBE's obligations under the policy to defend Apollo against claims for "Wrongful Employment Practices";

28. Under Louisiana law, an insurer cannot provide a "cafeteria defense," must instead defend all claims against an insured if there is even one claim which is not clearly and unambiguously excluded by the policy;

29. This Court finds that no coverage exists for the claims of Meche and Landry, since those claims were first asserted against Apollo prior to the inception date of the QBE policy on May 21, 1997;

30. Allowing for the absence of coverage for the claims of Meche and Landry, the Court finds that the total of attorney's fees and litigation expenses for the defense of Apollo in the underlying litigation for the time period of 1997 through 2000 (i.e., said sum which totals $538,245.53) should be reduced by 2/30th's (since the claims of Meche and Landry are excluded from the original 30 plaintiffs in this matter), thus leaving a total reimbursement due to Apollo by QBE of $502,362.49, but this does not include any amounts for which QBE may owe reimbursement as defense costs incurred by APOLLO after that date, or which may be incurred by Apollo as the underlying litigation continues;

Appendix B

31. The QBE policy provides for a deductible of $5,000 per claimant; therefore, from the total defense costs and expenses incurred by Apollo for the time period of 1997 through 2000, a deductible of $140,000 (28 plaintiffs multiplied by $5,000 per head) is applicable, thus Apollo's reimbursement at this time is $362,362.49 (i.e., $502,362.49 minus $140,000);

Based on the above findings, the COURT HEREBY ORDERS:

1. QBE to provide a defense to Apollo;

2. QBE to reimburse defense costs and expenses in the amount of $362,362.49;

3. QBE to reimburse costs and expenses for the time period from 2001 and forward, with respect to the claims of the 28 plaintiffs in this matter.

THUS DONE AND SIGNED ON THIS 22 DAY OF OCTOBER 2001.

s/ Richard T. Haik
Richard T. Haik
U.S. DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED FEBRUARY 20, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30304
cons. w/ 99-30306

George C. Samson, et al.,

Plaintiffs,

George C. Samson, III, et al.,

Plaintiffs-Appellants,

versus

Apollo Resources, Inc., doing business as
Apollo Services, Inc.; et al.,

Defendants-Appellees.

Lester D. Weaver; Crawford R. Norton,

Plaintiffs-Appellants,

versus

Apollo Resources, Inc., doing business as
Apollo Services, Inc.,

Defendant-Appellee.

Appendix C

No. 99-30407

George C. Samson, III, et al.,

Plaintiffs,

George C. Samson, III, et al.,

Plaintiffs-Appellants,

versus

Apollo Resources Inc., doing business as
Apollo Services, Inc.; et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Louisiana

Before KING, Chief Judge, PARKER, Circuit Judge, and FURGESON, District Judge.[1]

FURGESON, District Judge:

This case involves a dispute over the applicability and administration of the Fluctuating Workweek ("FWW") method for calculating employees' salaries and overtime wages. We review the district court's judgment rendered for

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1. District Judge of the Western District of Texas, sitting by designation.

the Defendant in a non-jury trial pursuant to FED. R. CIV. P. 52(c). For the reasons stated herein, we affirm.

FACTS

The Plaintiffs — George C. Samson, Jackie D. Hays, Brent C. Manuel, Kevin D. Smith, Norman J. Landry, and Melvin K. Smith — are former employees of the Defendant Apollo, Inc. ("Apollo"). Apollo is an oilfield services company based in Louisiana. Its president and sole shareholder is Jeffrey A. Reddoch, who is also named as a defendant in the suit. Plaintiffs worked on Apollo's offshore rigs as well as in its yard. During their employment, they were paid under a fluctuating workweek ("FWW") or sliding-scale method. This method is used primarily by employers whose employees may be called upon to work a fluctuating number of hours each week. Apollo adopted the FWW method in 1991 — after consultation with Don Strobel, then an Assistant District Director of the Wage and Hour Division of the Department of Labor ("DOL") — as a means of complying with the Fair Labor Standards Act ("FLSA") and meeting its own employment needs.

Under Apollo's policy, the employees received a fixed monthly wage plus a weekly overtime premium for each hour worked over forty. Unlike the standard "time and one-half" overtime premium, Apollo calculated the overtime premium by first dividing the monthly wage amount by 4.3 to arrive at the fixed weekly wage. Then each employee's weekly wage was divided by the actual number of hours worked by that employee for that particular week. This figure represented

the employee's "regular rate of pay"[2] for that workweek. Under this method, the "regular rate of pay" fluctuates from week to week depending on the actual number of hours worked by the employee. Apollo then paid the employee an additional one-half of that workweek's regular rate of pay for each hour worked over forty as an overtime premium. In other words, the employees received a fixed salary for all hours worked in any workweek plus one-half times the regular rate of pay for all hours worked over forty in that workweek. As part of its administration of the FWW method, Apollo made deductions from an employee's fixed salary in workweeks where the employee was willfully not available for work. These deductions, however, were taken only when the employee had not yet worked forty hours in that workweek.

PROCEDURAL HISTORY

Originally, twenty-six plaintiffs brought suit against Apollo under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., the Louisiana Wage Statute, LA.REV.STAT. ANN. § 23:631 and § 23:632, and general employment contract law. They complained that Apollo's use of the FWW method, pursuant to 29 C.F.R. § 778.114, was unlawful because the employees frequently worked more than sixty hours in a week without receiving an additional overtime premium. The employees further claim that even if Apollo was allowed to

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2. For example, if an employee works 60 hours in a given week and his fixed weekly salary is $500, then his "regular rate of pay" per hour is $8.33 for that week. If the employee works 50 hours in given week and his fixed weekly salary is $500, then his "regular rate of pay" per hour is $10 for that week.

use the FWW method, Apollo improperly administered the plan (1) by failing to meet the "clear mutual understanding" provision prior to implementing the plan as required by § 778.114, and (2) by taking wrongful deductions from their wages. Plaintiffs claim back wages and damages as a result.

Prior to trial, Apollo filed a motion in limine to restrict the introduction of evidence regarding non-employment business practices of Apollo and its owners, Jeffrey and Chiquita Reddoch. The trial court granted Apollo's motion in limine. In addition, the parties stipulated that the case would be severed after the completion of all testimony and evidence as to six of the Plaintiffs — Samson, Hays, Manuel, Smith, Landry and Smith — and that all remaining proceedings would be stayed. The case then proceeded to a bench trial. At the close of Plaintiffs' case-in-chief, Apollo moved for judgment under FED. R. CIV. P. 52(c). The trial court granted Apollo's motion in favor of Apollo on all of the claims, determining that Apollo did not violate the FLSA, the Louisiana Wage Statute or any general contract law. The Plaintiffs timely appealed.

The Plaintiffs raise numerous points of error on appeal. These points present four main issues: (1) whether Apollo may utilize the FWW method to pay its employees when the employee works more than sixty hours in a given week but does not receive an additional overtime premium (above one-half the regular rate); (2) even if Apollo may properly use the FWW method, whether it was properly administered by the company; (3) what damages, costs, and attorney's fees are Plaintiffs entitled to, if any; and (4) whether the district court erred in granting Apollo's motion in limine.

Appendix C

STANDARD OF REVIEW

Judgment entered under Rule 52(c) is made after the district court has heard all of the "evidence bearing on crucial issues of fact." FED. R. CIV. P. 52(c) advisory committee's notes. Findings of fact made pursuant to a Rule 52(c) judgment are reviewed only for clear error. *Southern Travel Club v. Carnival Air Lines, Inc.*, 986 F.2d 125, 128 (5th Cir. 1993). When the findings of fact are based on determinations regarding the credibility of witnesses, Rule 52 demands "even greater deference to the trial court's findings." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). The trial court's conclusions of law, however, are reviewed *de novo*. *Ivy v. Jones*, 192 F.3d 514 (5th Cir. 1999). Evidentiary rulings are reviewed for "abuse of discretion." *United States v. Townsend*, 31 F.3d 262, 267 (5th Cir. 1994).

DISCUSSION

The Fair Labor Standards Act generally requires that employees be paid an overtime premium of "time-and-one-half" for all hours worked in excess of forty hours in a week. 29 U.S.C. § 207(a). The Department of Labor provides to employers various methods for calculating overtime compensation to suit different employment needs while still complying with § 207(a). One such method is the Fluctuating Workweek method. 29 C.F.R. § 778.114 (stating the guidelines governing the use of the FWW method). Under the FWW method, the employee receives a fixed salary as compensation for all hours worked by the employee, whether above or below forty hours, as well as an additional overtime premium for each overtime hour. *Id.* § 778.114(a). The

overtime premium is calculated by dividing the fixed weekly salary by the number of hours that the employee actually works in a particular week to yield the employee's "regular rate of pay." *Id.* The employee is paid an overtime premium of one-half his regular rate of pay for each overtime hour. This premium is in addition to his fixed weekly salary. Under the FWW method, the employee is effectively earning time-and-a half as overtime pay. However, his hourly wage and the actual amount of overtime pay he earns decreases the more hours that he works. The fixed salary must be sufficient to provide compensation at regular rate meeting the minimum wage requirement of 29 U.S.C. § 206(a)(1), and the overtime premium cannot be less than one-half the regular rate of pay. 29 C.F.R. § 778.114(c). *Condo v. Sysco Corp.*, 1 F.3d 599, 601 (7th Cir. 1993), *cert. denied*, 510 U.S. 1110, (1994); *Cash v. Conn Appliances, Inc.*, 2 F.Supp.2d 884, 893 (E.D.Tex. 1997).

I. May an employer use the FWW method when the employee works more than sixty hours in a given week without paying the employee an additional overtime premium?

The Plaintiffs contend that the trial court erred in determining that the FWW method may be used when an employee works more than sixty hours in a week and no additional overtime premium (above one-half the regular rate) is paid for those hours worked over sixty. Because this issue raises a question of statutory interpretation and application and this is a question of law, we review the district court's ruling on this issue *de novo.*

Appendix C

29 C.F.R. § 778.114(c) states, in relevant part, that:

> [W]here all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot rely on any application of the fluctuating workweek method.

From this provision, the Plaintiffs extrapolate the contention that if an employee works in excess of sixty hours in a workweek, then the employer must pay the employee an overtime rate of more than the one-half the regular rate of pay minimally required by § 778.114(a). Otherwise, as Plaintiffs argue, the rate of pay for each overtime hour (including the overtime premium) is less than the rate of pay for nonovertime hours, in violation of § 778.114(c). This argument turns on the definition of the rate of pay for nonovertime hours.

The Plaintiffs assert that dividing the fixed weekly salary by forty hours yields the rate of pay for nonovertime hours referred to in the last sentence of § 778.114(c). This contention rests on the assumption that the hourly rate for nonovertime hours is determined by dividing the fixed weekly salary by forty hours. Under this assumption, after sixty hours, the rate of pay for each overtime hour is less than the rate of pay for each hour that the employee would have received if he had worked only forty hours.

To illustrate, under the FWW method, an employee who is paid a salary of $500 a week and who works only forty

hours, effectively makes $12.50 per hour.[3] In a week where the employee works sixty hours, the overtime rate for hours forty-one to sixty is $12.50 per hour ($8.33 an hour "regular rate,"[4] plus $4.17 per hour as overtime premium[5]). In a sixty-one hour week, however, the employee's overtime rate drops to $12.30 an hour for hours forty-one through sixty-one ($8.20 per hour as "regular rate," plus $4.10 per hour overtime premium). When the employee works eighty hours in a week, the overtime rate drops to $9.38 ($6.25 at hour as "regular rate," plus 3.23 as an overtime premium). As these examples show, under the Plaintiffs' model, the more hours that an employee works, the lower his rate of pay per overtime hour becomes. After sixty hours, unless an overtime premium of greater than one-half the regular rate is paid, the rate of pay for overtime hours is no greater (but is actually less) than the rate of pay that the employee would receive if he had worked no overtime at all, i.e., if he only worked forty hours.

The Plaintiffs assert, therefore, that § 778.114(c) should be read as prohibiting the use of the FWW method for weeks where the employee works over sixty hours without receiving more than one-half the regular rate as the overtime premium because in such weeks the "employee is being paid for overtime hours at a rate not greater than that which he receives

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3. $500/40 hours = $12.50 per hour.

4. Regular rate = fixed weekly salary ($500) divided by total hours worked (60).

5. The minimally required overtime premium is one-half the regular rate of pay for that week.

for nonovertime hours." 29 C.F.R. § 778.114(c). Though the Plaintiffs' interpretation is facially appealing, it is an incorrect reading of section 778.114(c) and the principles of the FLSA.

Section 778.114(a) makes clear that the fixed weekly salary compensates the employee for all hours worked, including overtime hours. Therefore, since the employee already receives 100% of his regular rate of pay for each overtime hour worked, the time and one-half overtime provision of 29 U.S.C. § 207(a)(1) requires that the employee receive only an additional 50% of his regular rate for each overtime hour. *Condo v. Sysco Corp.*, 1 F.3d 599, 605 (7th Cir. 1993).

The fallacy of the Plaintiffs' reading of § 778.114(c) lies in their interpretation of the rate of pay for nonovertime hours. Under the Appellant's model, the rate of pay for nonovertime hours erroneously includes overtime wages already built into the fixed salary. As § 778.114(c) makes clear, the fixed salary paid under the FWW method is not intended as compensation only for the forty hours traditionally recognized as nonovertime hours but for all "hours worked each workweek, rather than for working 40 hours or some other fixed weekly work period." 29 C.F.R. § 778.114(a). Accordingly, the fixed weekly salary necessarily includes compensation intended for overtime hours. *See id.* (noting that the FWW method complies with the overtime pay requirement of 29 U.S.C. § 207(a)(1) because overtime hours "have already been compensated at the straight time regular rate").

If a fixed salary includes a premium for overtime hours, then this premium must be deducted before calculating the

rate of pay for nonovertime hours so that the actual rate of pay for nonovertime hours is not inflated by the overtime premium. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464, 463-64 (1948) ("When the statute says that the employee shall receive for his excess hours one and one-half times the regular rate at which he is employed, it is clear to us that Congress intended to exclude overtime premium payments from the computation of the regular rate of pay."). As such, Plaintiffs' calculation of the rate for nonovertime hours is artificially high because it includes compensation intended for overtime hours. In order to accurately compare the nonovertime hourly rate of pay to the overtime hourly rate of pay, the portion of fixed salary intended as payment for overtime must be deducted. 29 C.F.R. § 778.114(a).

A reading of § 778.114 suggests that rather than requiring employers to calculate and deduct the overtime premium on a week to week basis for all their employees for the purpose of determining compliance with the overtime requirement, § 778.114 is a *fait accompli.* That is, so long as the regular rate of pay does not fall below the minimum hourly wage requirements, "[p]ayment for overtime hours at one-half [the regular rate] in addition to the salary satisfies the overtime pay requirement" regardless of whether or not they exceed sixty hours. 29 C.F.R. § 778.114(a); *See Aaron v. City of Wichita, Kansas*, 54 F.3d 652, 657 (10th Cir. 1995); *see also Flood v. New Hanover Cnty.*, 125 F.3d 249, 252 (4th Cir. 1997) ("Since the employer has already paid the employee a regular rate of pay for all of the hours that the employee worked, including the overtime hours, it only has to pay an additional one-half time pay premium for the overtime hours.").

Appendix C

If § 778.114(a) already states the overtime pay requirement is satisfied when the employee is paid one-half times the regular rate for overtime hours in addition to the fixed salary, then what is the proper interpretation of the last sentence of § 778.114(c)?

> [W]here all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot rely on any application of the fluctuating workweek method.

29 C.F.R. § 778.114(c). According to the Plaintiffs, this sentence of § 778.114(c) prohibits the employer from using the FWW method for weeks where the employee works over sixty hours and does not receive more than one-half the regular rate as the overtime premium in addition to the fixed salary. Any other interpretation, the Plaintiffs contend, would render the last sentence of § 778.114(c) surplusage.

A more likely reading of § 778.114(c), however, is that an employer cannot apply the overtime hours that an employee works in one week to another week in the same pay period where the employee works less than forty hours in order to avoid paying the overtime premium. The FWW method and the FLSA determine whether overtime pay is required by examining the number of hours worked in an individual week. Employers, however, may issue pay checks on a bi-weekly or monthly basis — commonly referred to as the "pay period." Therefore, rather than being surplusage, § 778.144(c) is meant to ensure that an employee is always

paid an overtime premium for each hour worked over forty hours in a given week, regardless of the number of hours worked in earlier, or later, weeks within the same pay period. *See Cash*, 2 F.Supp.2d at 895 n. 24 (holding that section 778.114(c) is meant to prohibit the practice of cutting salary for a week in which less than forty hours is worked in order to counterbalance compensation for hours over forty worked in another week of the same pay period).

The Court finds that the FLSA and 29 C.F.R. § 778.114(c) does not prevent an employer from using the FWW method where the employee works over sixty hours and the overtime premium paid is not more than 50% of his regular rate.

II. Was the FWW method properly administered by Apollo?

The Plaintiffs assert that the trial court erred in its finding that Apollo properly administered the FWW method. First, they argue that the trial court erred in finding that the "clear mutual understanding" prerequisite was met. Second, the Plaintiffs contend that the deductions made to their salaries violated federal and/or Louisiana state law. The Court is unpersuaded by these arguments and affirms the district court's rulings.

A. Burden of Proof

Generally, a plaintiff suing under the FLSA carries the burden of proving all elements of his or her claim. In a suit for the payment of overtime wages, the employer claiming that the suing employee is exempt from the overtime require-

ment has the burden of proving that the employee falls within the claimed exempted category. *Dingwall v. Friedman Fisher Assoc.*, 3 F.Supp.2d 215, 218 (N.D.N.Y. 1998). This Court has never directly addressed the issue of which party — whether the employer or the employee — has the burden of proving compliance with the requirements of the FWW method. We hold that the employee has this burden.

As its name implies, the FWW method is one method of complying with the overtime payment requirements of 29 U.S.C. § 207(a)(1). It is not an exemption to it. *See* 29 C.F.R. § 778.2 (noting that the subpart of 778, which includes the FWW method, does not discuss any specific exemptions to the overtime or minimum wage payment requirements of the FLSA); *Griffin v. Wake County*, 142 F.3d 712, 715 (4th Cir. 1998); *but see Dingwall v. Friedman Fisher Assocs.*, 3 F. Supp.2d 215, 221 (N.D.N.Y. 1998) (determining that the FWW is "an exception to the normal rights of the employee and thus the employer bears the burden of proving that all the requirements for applying the method are present"). Therefore, the employee bears the burden of proving that the employer failed to properly administer the FWW method. *Cash*, 2 F.Supp.2d at 896 ("The employee alleging an improper application of the fluctuating workweek method bears the burden of proof.").

B. Clear Understanding Requirement

The Plaintiffs contend that the trial court erred in finding that the "clear understanding" criterion required by § 778.114 was met. They assert two points here. First, they claim that Apollo misrepresented the number of hours that the

employees would be called upon to work, specifically that Apollo made misrepresentations about comparable amounts of time off. For example, they argue that Apollo told employees that if an employee was required to work five days on the rig, then he would get a comparable five days off the rig. Second, the Plaintiffs assert that Apollo failed to disclose that it was not obligated to pay the employees the fixed salary for weeks in which the employee was not called upon to work at all. They argue that they could not have formed the clear understanding of the FWW method as a matter of law given these misrepresentations.

Again, these arguments are unpersuasive. Section 778.114 is specific as to what the employee must understand before the FWW method may be used. It only requires that "[t]here is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period." 29 C.F.R. § 778.114(a); 29 C.F.R. § 778.114(c) (prohibiting the use of the FWW method "unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked"); *see, e.g.*, *Griffin*, 142 F.3d at 716 (reading the clear understanding requirement as only encompassing the fact that the fixed salary was compensation for all hours that the employee worked); *Cash*, 2 F.Supp.2d at 907 (adopting and applying this standard of the clear mutual understanding requirement). We decline to expand the "clear understanding" requirement of section 778.144 to include the details cited

by the Plain-tiffs. *See, e.g., Griffin*, 142 F.3d at 717 (finding that the FLSA does not require that the "employer hold an employee's hand and specifically tell him or her precisely how the payroll system works"). Section 778.114 does not require that the employee know the hours expected to be worked, that the fixed salary is not be paid for weeks where the employee performs no work, or any other details of how the FWW is administered. *Bailey v. County of Georgetown*, 94 F.3d 152, 156 (4th Cir. 1996) (determining that neither section 778.114 nor the FLSA "in any way indicates that an employee also must understand the manner in which his or her overtime pay is calculated").

In addition, even taking into account the misrepresentations alleged by the Plaintiffs, the Court finds no basis for disturbing the trial court's finding that the "clear mutual understanding" criterion was satisfied. These allegations of misrepresentation were already considered by the trial court and soundly rejected. In fact, the trial judge determined that Apollo went above and beyond what was required by § 778.114. The evidence in the record indicates that Apollo took the necessary steps to explain the FWW method to employees. The record is replete with testimony that Kelly Boudreaux and Ben Stonecipher explained to the Plaintiffs that they would be paid a fixed salary regardless of the hours that they were called on to work. In certain instances, Boudreaux and Stonecipher used formula sheets to illustrate this point. After hearing this testimony and weighing the credibility of the testimony, the district judge found that Apollo took every opportunity to explain the fixed salary provision of the FWW method to the Plaintiffs. The evidence shows that the Plaintiffs did have or should have had a clear

understanding that they would be paid a fixed salary under the FWW method. And Plaintiffs cite to nothing in the record sufficient to show that the trial court's findings were clearly erroneous. To the contrary, the evidence in the record adequately supports the trial court's findings that Apollo met the clear understanding requirement.

C. Did Apollo improperly administer the FWW method by taking deductions from the employees' fixed salaries for willful absences?

1. Louisiana State Law

Plaintiffs next argue that the trial court erred in finding that Apollo's practice of making deductions from the employees' salaries for willful absences was allowed by federal and state law. Plaintiffs point to LA. REV. STAT. ANN. § 23:635. Section 23:635 states, in relevant part, that:

> No person, acting either for himself or as agent or otherwise, shall assess any *fines* against his employees or deduct any sum *as fines* from their wages.

LA. REV. STAT. ANN. § 23:635 (West 1999) (emphasis added). Because § 23:635 is penal in nature, Louisiana jurisprudence requires that it must be strictly construed. *See, e.g., Hanks v. Shreveport Yellow Cabs, Inc.*, 187 So. 817, 819 (La.App. 1939).

As this statute makes clear, not all deductions are prohibited; only fines or deductions made as fines are prohibited. The term "fines" has a very specific and limited

meaning. "A fine, within the meaning of [section] 23:635, is a pecuniary penalty imposed for the violation of some law, rule or regulation." *Brown v. Navarre Chevrolet, Inc.*, 610 So.2d 165, 170 (La.App. 1992). The few cases discussing § 23:635 restrict employers from levying fines on the employee (via deductions from wages) for failing to follow workplace procedures and regulations. *Brown*, 610 So.2d at 168, 170 (finding that deductions made because employee arrived late for meetings, and parked company car in wrong place were fines and, therefore, prohibited by § 23:635); *Stoll v. Goodnight Corp.*, 469 So.2d 1072, 1077 (La.App. 1985) (determining that requiring employee to reimburse employer for bad checks written by customers was not a fine where agreement existed between parties that employee would cover such losses); *Hanks*, 187 So. at 819 (holding that employer's charges against driver-employee for damages to a cab were not fines because the charge was used to cover cost of repair to cab and employee agreed to be responsible for such damage).

Under a strict construction of the term fines, the deductions made by Apollo for willful absences or tardiness do not constitute a fine so as to be prohibited by Louisiana law. The deductions were not "arbitrarily fixed and assessed" as punishment against the employee for violating a work place rule or regulation. *Hank*, 187 So. at 819 (clarifying the characteristics that distinguish a fine from a lawful deduction). Rather than acting as a fine or punishment, the deductions allowed Apollo to avoid paying an employee for wages to which he was not otherwise entitled. While failing to show up for work when called is certainly a "violation" of a workplace "rule" requiring attendance, no authority exists

in either § 23:635 or 29 C.F.R. 778.114 requiring the employer to pay employees for times which the employee intentionally skips work. Therefore, § 23:635 did not prohibit Apollo from making deductions from the Plaintiffs' salaries for willful absences.

2. Federal Law

Section 778.144 itself is silent on the issue of whether such deductions are permissible under the FWW method. The Plaintiffs' only support for their contention that deductions are not permitted under the FWW method is DOL interpretive letter No. 479, written in 1966. Letter No. 479 states, in relevant part, that "[d]eductions for less than a week, whether for illness, personal business, or other reasons, may not be made under [the FWW] method of compensation." Later DOL opinion letters and materials, however, state otherwise. DOL Opinion Letter No. 988, written in May 1969, states that under the FWW method "occasional disciplinary deduction for wilful absence or tardiness may be made." This letter tracks the language of the DOL's FIELD OPERATIONS HANDBOOK, published in 1967, regarding disciplinary deductions under the FWW method. The 1967 Handbook recognizes that an employer may make "occasional disciplinary deductions for wilful absence or tardiness." DEPARTMENT OF LABOR, FIELD OPERATIONS HANDBOOK § 320b04b (1967). Furthermore, a 1982 letter — referred to as the Otter Letter — states that "[o]ccasional deductions may be made [from an employee's salary] as a disciplinary measure for willful absence or tardiness." The problem here is resolving which of the conflicting DOL pronouncements should apply. When faced with an issue involving statutory

construction, federal courts show " 'great deference to the interpretation given the statute by the officers or agency charged with its enforcement.' " *Biggs v. Wilson*, 1 F.3d 1537, 1543 (9th Cir. 1993) (*quoting Udall v. Tallman*, 380 U.S. 1 (1965)). Interpretive and opinion letters by the Department of Labor do not *per se* bind the court. Such materials, however, do "constitute a body of experienced and informed judgment" and the court will give these materials "substantial weight." *Flood*, 125 F.3d at 253 (citation omitted).

The Plaintiffs correctly point out that the 1969 and 1982 letters are unpublished pronouncements of the DOL's interpretation of the FWW method. They further contend that since the letters are unpublished this Court should not rely upon them. But the fact that they are unpublished does not dismiss entirely the persuasive value and insight that they may provide this Court, especially in light of their consistency with the Field Operation Handbook. Unpublished opinion letters by a government agency still reflect the agency's interpretation and intended application of the regulation. The Court finds that the survey of the available material from the DOL indicates that occasional deductions for wilful absence or tardiness are not prohibited under the FWW method. *See Cash*, 2 F.Supp.2d at 895 ("[The FWW method] however, in no way bars 'occasional' deductions from salary for 'wilful absences or tardiness,' so long as the full salary figures in the calculation of the regular rate and the amount of salary remaining after such reductions supports an average hourly rate at least equal to the applicable minimum wage.").

In addition, deductions for willful absences or tardiness do not run afoul of the guidelines governing the FWW method. The central feature of the FWW method is that the fixed salary is "straight time pay for whatever hours [the employee] is called upon to work in a workweek." 29 C.F.R. § 778.114(a). This does not mean, however, that the employer must pay the full salary even though the employee decides not to work all the hours that he is called upon to work. To hold otherwise would allow for a tremendous abuse of the FWW method by employees. Beyond Interpretive Letter No. 479, which the Court finds unpersuasive in light of later pronouncements by the DOL, the Plaintiffs provides no support for its argument that deductions for willful absences is not allowed under the FWW method.

The Plaintiffs further argue that even if "occasional deductions" are permitted, the deductions made by Apollo were improper because they were made without adequate investigation or when the employee was not actually wilfully absent or tardy. Again, the Court finds no basis to reverse the district court's careful findings of fact on this issue. In each instance, it found that the employee in question had been wilfully absent, that Apollo had adequately investigated the circumstances surrounding the employee's absence, and that Apollo was justified in making the deductions. These conclusions were made in large part based on the district court's assessment of the credibility of the witnesses and the Plaintiffs. In fact, the court emphasized that the testimony of the Plaintiffs appeared contrived, orchestrated, and wholly unbelievable. As such, we give the determination even greater deference. Nothing in the record indicates that these findings were clearly erroneous.

Appendix C

III. Are the Plaintiffs entitled to attorney's fees, penalties, or liquidated damages under either federal or Louisiana state law?

Even though they were unsuccessful on all of their claims, the Plaintiffs contend that they should be awarded attorney's fees, penalties, and liquidated damages under federal and state law. Their argument is predicated on the fact that Apollo tendered checks totaling $487.89 to five of the Plaintiffs midway through the trial. Ostensibly, these checks were payment for hours worked by the employees, but which the Plaintiffs claimed Apollo failed to credit. The Plaintiffs argue that these payments amount to an admission of liability on those claims for backpay. As a result of this implied admission, Plaintiffs contend that they are due attorney's fees, penalties, and liquidated damages under federal and Louisiana state law. The Court disagrees.

The trial record and relevant case law clearly indicate that Apollo's payments did not constitute any admission of liability. The record makes clear that Apollo tendered payment in order to avoid an additional day and a half of trial that would have been needed to adjudicate the claims for uncredited overtime hours. In making the payments, Apollo made clear that the payments were not an admission of any liability or waiver of any defenses. The Plaintiffs likewise stipulated that their receipt and acceptance of the payments did not in any way dispose of or otherwise decide the merits of their claims for the uncredited overtime hours. Clearly, both parties agreed that Apollo's payment in no way determined the merits of the Plaintiffs' claim.

The Court finds no reason to disregard the express stipulation and agreement of the parties and to now infer an admission of liability on the part of Apollo. *McClosky v. Eckart*, 164 F.2d 257, 259 (5th Cir. 1947) (refusing to infer that overtime wages were owed by the employer from the fact that the employer made a compromise settlement payment on this claim but expressly stipulated that payment was not an admission of liability). The district court found for Apollo on all of the Plaintiffs' claims. It found that Apollo did not violate the FLSA, Louisiana law or general contract law either by using the FWW method or in its administration of it. Without any admission of liability from Apollo, the Plaintiffs' arguments for attorneys fees, liquidated damages, and penalties quickly lose all merit.

A. Attorney's fees

Despite their failure to prevail on any of its claims, the Plaintiffs assert that because they were forced to file suit before Apollo made payment for uncredited time, an award of attorney's fees is appropriate under 29 U.S.C. § 216(b) and LA.REV.STAT. ANN. § 23:632. However, this contention misapplies both of these statutes. First, 29 U.S.C. § 216(b) allows an award of attorney's fees only "in addition to any judgment awarded to the plaintiff." Here, attorney's fees are not available because the Plaintiffs failed to prevail on any of their claims. Similarly, under § 23:632, an award of reasonable attorney's fees is mandatory when an employee brings a "well-founded" suit for unpaid wages. A suit is "well-founded" only if the employee receives a judgment in his favor. *See Hebert v. Insurance Ctr. Inc.*, 706 So.2d 1007, 1014 (La.App. 1998); *Loup v. Louisiana State Sch. for the*

Deaf, 229 So.2d 689, 694 (La.App. 1999) ("Suits in which the recovery of back wages is *granted* are considered 'well-founded.'") (emphasis added); *Byrnes v. Orkin Exterminating Co.*, 562 F.Supp. 892, 894 (E.D.La.1983) ("Because no wages have been found to be due, this claim cannot be considered a 'well-founded' suit."). Clearly, under Louisiana law, Plaintiffs are not entitled to attorney's fees under § 23:632 since they did not bring a "well-founded" suit as evidenced by their failure to prevail on any of their claims.

B. Liquidated Damages

If it is found that the employer failed to properly pay wages to its employees, the employer may be liable for liquidated damages in an amount equal to the amount of unpaid wages. 29 U.S.C. § 216(b). An employer may still avoid liquidated damages if the employer shows that he acted in good faith and that he had reasonable grounds for believing that he was not acting in violation of the FLSA. 29 U.S.C. § 260. It is within the sound discretion of the trial court whether or not to award liquidated damages in the event of a good faith showing by the employer. 29 U.S.C. § 260. Plaintiffs fail to show that the trial court abused its discretion in not awarding them liquidated damages.

First, the trial court ruled that Apollo did not violate either the FLSA, Louisiana law or general contract law. Plaintiffs failed to make the predicate showing that Apollo failed to properly pay wages to the Plaintiffs. Even if this Court assumes *arguendo* that Apollo violated the FLSA., the district court found that Apollo was acting in good faith and, in its discretion, decided not to impose liquidated damages.

The record supports a finding that Apollo had reasonable grounds to believe that it was complying with the FLSA. For instance, unlike the cases cited on by the Plaintiffs where liquidated damages were found warranted because the employer failed to change its policy after it became aware of its violations, Apollo took affirmative steps to comply with the FLSA. It consulted with the DOL, specifically with Don Strobel, the Assistant Director for the DOL, to devise a salary scheme that would comply to all the relevant provisions of the FLSA. It was after this consultation that Apollo implemented the FWW method. The trial judge made the expressed determination that Apollo made every reasonable effort to comply with the overtime requirements of the FLSA. The DOL investigations cited by Plaintiffs never led to an actual finding of a violation of the FLSA. Rather, the investigations only led to a letter being sent to Apollo's employees informing them that they might have a claim for back wages. Given the evidence on the record, the Plaintiffs fail to show that the trial court was clearly erroneous in deciding not awarding liquidated damages. *See Lee v. Coahoma County, Miss.*, 937 F.2d 220, 226-27 (5th Cir. 1991)("If the district court finds that employer's action which violated the FLSA was taken in good faith, which good faith was supported by reasonable grounds for believing that the actions complied with the FLSA, it may choose not to award liquidated damages.").

C. Penalty Wages

In order to recover penalty wages under LA. REV. STAT. ANN. § 23:632, the employee must prove (1) that wages were due and owing, (2) that a demand for payment was made at

the place where the employee is usually paid, and (3) that the employer failed or refused to pay after the employee's demand. *Hughes v. Cooter Brown's Tavern, Inc.*, 591 So.2d 1334, 1337 (La.App. – 1992). Because it is a penal statute, section 23:632 is strictly construed. *Id.* Plaintiffs are not entitled to penalty wages because they failed to make the requisite showing under § 23:632. As noted above, Plaintiffs never established that back wages were owed to them by Apollo and such proof cannot be implied from Apollo's tender of payments to some of the Plaintiffs.

IV. Motion in Limine

The Plaintiffs' final argument on appeal is that the district court erred in excluding from trial impeachment evidence. Specifically, the Plaintiffs sought to introduce evidence regarding alleged environmental violations by Apollo, improper tax deductions made by Apollo and its owners, and Apollo's violation of local building codes. None of these alleged incidents led to any formal conviction. Plaintiffs claim that the excluded evidence would have called the credibility of several of Apollo's witnesses into question. This Court reviews a trial court's evidentiary rulings for abuse of discretion. *Townsend*, 31 F.3d at 267.

FED. R. EVID. 608(b) states:

> Specific instances of the conduct of a witness for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided by rule 609, may not be proved by extrinsic evidence.

Appendix C

By its language, Rule 608(b) clearly prevents the Plaintiffs from presenting evidence of specific instances of untruthful conduct by certain Apollo witness to show that these witnesses had a propensity for untruthfulness. 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6117 (1993) (recognizing that under the proper application of Rule 608(b) extrinsic evidence of specific instances of bad conduct is made inadmissible when offered to prove a witness's character for untruthfulness). In addition, FED. R. EVID. 403 allows the district court to exclude relevant evidence if "its probative value is substantially outweighed . . . by considerations of undue delay [or] waster of time." Here, the district court found that the evidence had little probative value to the issue of the witnesses' credibility and virtually no relevance to the material issues in the case. In addition, proof of these collateral issues would have likely required many additional days of testimony without shedding any light on the central issue of the case — Apollo's use of the FWW method. In light of Rules 403 and 608(b), even if the evidence that Plaintiffs wished to introduce may have been relevant in determining the credibility of Apollo's witnesses, the district court's decision to exclude the evidence did not amount to "manifest error" so as to constitute an abuse of discretion. *United States v. Williams*, 822 F.2d 512, 517 (5th Cir. 1987) ("The district court may under Rule 608(b) determine if evidence is probative of truthfulness, and under 403 exclude even probative evidence if the prejudicial effect outweighs the probative value."); *cf. United States v. Miller*, 91 F.3d 1160,1163 (8th Cir. 1996) (affirming district court's ruling to exclude evidence that witness alleged bribed police officer, which was unrelated to the charged offense).

Appendix C

Conclusion

Consolidated with this appeal are several appeals and motions. In light of the consolidation of the appeals and the Court's above opinion, Appellants' appeals of the district court's rulings on the motion in limine and on the motion for partial summary judgment along with Appellee's Motion to Dismiss these two appeals are DENIED as moot. In addition, Appellants' motion for attorney's fees and sanctions is DENIED.

For the above stated reasons, the judgment of the district court is AFFIRMED.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 29, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30218

GEORGE C SAMSON III, ET AL

Plaintiffs

v.

APOLLO RESOURCES INC, Etc; ET AL

Defendants

APOLLO RESOURCES INC,
doing business as Apollo Services Inc

Defendant - Third Party Plaintiff -
Cross Defendant - Appellee

v.

QBE INTERNATIONAL INSURANCE, LTD

Third Party Defendant -
Cross Claimant - Appellant

Appendix D

Appeal from the United States District Court for the Western District of Louisiana, Lafayette

ON PETITION FOR REHEARING EN BANC

(Opinion 3/20/03, 5 Cir., _____, _____ F.3d _____)

Before DAVIS, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ W. Eugene Davis
United States Circuit Judge

APPENDIX E — RELEVANT PROVISIONS INVOLVED

Federal Rules of Civil Procedure

FRCP Rule 8

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

* * *

Appendix E

FRCP Rule 15

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

* * *

Appendix E

FRCP Rule 54

Rule 54. Judgments; Costs

* * *

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

* * *